(TOLD TO NOTICE)
FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

2016 SEP 28 P 4: 25

CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

ROBERT NEIL in his capacity as Trustee of the CSR, Incorporated Employee Stock Ownership Plan,

and

CSR, INCORPORATED, in its corporate capacity and in its capacity as fiduciary of the CSR, Incorporated Employee Stock Ownership Plan,

Plaintiffs,

v.

JOHN FOSTER-BEY, individually and in his capacity as the former Trustee of the CSR Incorporated Employee Stock Ownership Plan
5311 Tractor Lane
Fairfax, Virginia 22030

Defendant.

Civil Action No. 1:16cv1227-JCC-IDD

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

COME NOW the Plaintiffs, CSR, Incorporated ("CSR") and Robert Neil, Trustee of the CSR Employee Stock Ownership Plan ("Neil," together with CSR, the "Plaintiffs"), and move this Court for a preliminary injunction pursuant to Federal Rule of Civil Procedure 65 as follows:

FACTUAL BACKGROUND

CSR is a government contractor providing professional and technical consulting services and research with its principal place of business in Arlington County, Virginia. The common stock of CSR is owned by the CSR Employee Stock Ownership Plan (the "CSR ESOP"), which is administered by its Trustee for the sole benefit of the CSR ESOP and its participants and beneficiaries pursuant to ERISA.

LAW OFFICES
BEAN, KINNEY & KORMAN
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CSR is operated by a board of directors (the "Board"). The Board has final authority over the business of CSR, is responsible for electing the President and CEO of CSR, selecting, overseeing, and removing, if necessary, the Trustee of the CSR ESOP, and has authority to remove CSR's directors. CSR's Bylaws (the "Bylaws," a copy of which is attached hereto as **Exhibit A**) § 4.1, 4.2, 4.11, 5.1; CSR ESOP Trust Agreement (the "Trust Agreement," a copy of which is attached hereto as **Exhibit B**) § 5.2; CSR ESOP Plan Agreement (the "Plan Agreement," a copy of which is attached hereto as **Exhibit C**) § 9.1, 9.2. The Board has three directors, Thomas Edgar ("Edgar"), Neil, and Cynthia Marsden ("Marsden"), who are outside directors, are not CSR employees, and have no pecuniary interest in CSR. Until recently, CSR had a fourth director, Defendant John Foster-Bey ("Foster-Bey"), who was also an employee of CSR.

Defendant Foster-Bey was elected to the Board and was elected President and CEO of CSR on December 2, 2011, and was elected Trustee of the CSR ESOP on June 20, 2012. Until August 2013, Foster-Bey was the only director of CSR. At that time, he, as Trustee, elected Edgar and Neil to the Board as outside directors. Marsden was added to the Board on January 28, 2016. The President and CEO and members of the Board owe fiduciary duties to CSR. In addition, the Trustee owes fiduciary duties to the CSR ESOP, its participants and beneficiaries that are the highest known to the law—those of trustees of an express trust.

While initially Foster-Bey performed his duties adequately, over the past year and a half Foster-Bey has failed to perform his duties as President, CEO, and Trustee. He has consistently failed to appear at work, and when he does come in it is often outside of normal business hours. Further, he has failed to engage in the business development activities required of him as CEO.

The Board has repeatedly asked Foster-Bey over this time period to resume performing his duties, to no avail.

Accordingly, on or about September 12, 2016, the Board informed Foster-Bey that they would be terminating him as President, CEO, member of the Board, and Trustee of the ESOP. Upon being so informed, Foster-Bey pleaded with the Board to give him a second chance, and the Board reluctantly agreed, with specific mandates for Foster-Bey moving forward. The Board prepared a memorandum of understanding that outlined the conditions under which the Board would allow Foster-Bey to remain in his positions with CSR for a period of six months to allow him to prove to the Board that he could appear at the CSR offices on a consistent and timely basis and perform the business development necessary to ensure future business for CSR that he had been neglecting. The memorandum was sent to Foster-Bey on September 15, 2016, and arrangements were made for Foster-Bey and the Board to meet at CSR's offices on September 19, 2016 to discuss Foster-Bey remaining at CSR on a provisional basis with supervision, as outlined in the memorandum. Foster-Bey appeared late for the scheduled meeting and informed the Board that he could not agree to the terms the Board proposed as conditions for his remaining at CSR in this provisional period, particularly the requirement that he be physically present in the CSR offices for at least six hours a day, four days a week. Accordingly, the Board informed Foster-Bey that they were no longer interested in considering his request for a second chance and were going to terminate him as President, CEO, member of the Board, and Trustee of the CSR ESOP.

Foster-Bey informed the outside members of the Board that he would not recognize such a termination because Edgar's and Neil's terms as members of the Board had expired in August of 2016 and he was going to use his position as Trustee to replace them with new board members who would retain him. However, the outside directors' terms had clearly not expired, as evidenced by a March 9, 2016 Resolution of the Board executed by all four then-members of the Board, including Foster-Bey (the "March 9 Resolution"), stating that Edgar's and Neil's terms end September 30, 2016 and Marsden's term ends September 30, 2017. A copy of the March 9 Resolution is attached hereto as **Exhibit D**.

The outside Board members reminded Foster-Bey that Edgar's and Neil's terms had not expired and, later that day, sent Foster-Bey a copy of the March 9 Board Resolution. When confronted with the fact that the Board has authority to terminate him, Foster-Bey informed the Board that he would then not renew Edgar and Neil, whose terms were expiring on September 30, 2016, as members of the Board. Further, Foster-Bey asserted that he would use his position as Trustee to vote the shares of CSR held by the CSR ESOP to appoint new members of the Board who would keep him on as President, CEO, and Trustee, effectively terminating Edgar and Neil from the Board in retaliation for firing him. Foster-Bey then did purport to appoint new members to the Board. That action was clearly in retaliation for his termination, not taken with the interests of CSR or the CSR ESOP, its beneficiaries, or participants in mind, and was a clear breach of Foster-Bey's fiduciary duties to CSR and the CSR ESOP.

Given Foster-Bey's conduct and blatant breach of his fiduciary duties, the Board had no choice but to remove Foster-Bey from all roles he held at CSR. Nevertheless, hoping that a resolution might be reached, on September 21, 2016, the Board sent Foster-Bey formal notices terminating Foster-Bey as President, CEO, and as a member of the Board, but stated that the notices were not yet effective while the parties attempted to resolve matters. On September 26, 2016, after attempting without success to resolve this matter, the Board informed Foster-Bey that the previously sent notices terminating him as President, CEO, and as a member of the Board of

CSR were and are now legally effective, sent Foster-Bey a separate notice formally terminating him as Trustee of the CSR ESOP, and selected Neil as Trustee on an interim basis until a permanent replacement can be found. A copy of the termination notices and accompanying transmission messages is attached hereto as **Exhibit E**.

Despite the March 9 Resolution and his termination by the Board, Foster-Bey maintains that he continues to be the President and CEO of CSR as well as Trustee of the CSR ESOP. This dispute over who has authority to control CSR makes it impossible for CSR to operate. Outside third-parties do not know with whom they should deal, receive conflicting information from the Board and Foster-Bey, and may enter into agreements with Foster-Bey that CSR is ultimately forced to honor even after Foster-Bey is determined to have had no authority by this Court. Moreover, this dispute stands to injure the CSR ESOP and its participants and beneficiaries, CSR's current and former employees. Any damage to CSR's value indirectly damages its sole shareholder, the CSR ESOP, and impairs the ability of the CSR ESOP to make benefit payments. Further, current employees do not know who to recognize as management of CSR and are at risk of being improperly terminated by Foster-Bey for supporting the Board, which may have significant negative effects on their ability to earn a livelihood and access medical benefits.

Accordingly, Plaintiffs CSR and Neil, as Trustee of the CSR ESOP, bring this motion asking the Court to put a temporary injunction in place freezing the management of CSR and the CSR ESOP as they were on September 26, 2016 until this matter is resolved.

STANDARD OF LAW

The Court may issue a preliminary injunction under Federal Rule of Civil Procedure 65(a) if the moving party satisfies the following four factors: (1) that the movant is "likely to succeed on the merits"; (2) that the movant is "likely to suffer irreparable harm in the absence of preliminary relief"; (3) that the "balance of equities tips in [the movant's] favor"; and (4) that "an injunction is in the public interest." *Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013) (quoting *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008)).

ARGUMENT

As outlined above, the Board has the sole responsibility to oversee, elect, and terminate, if necessary, the Trustee of the ESOP and the President and CEO of CSR. In fulfilling that responsibility, the outside directors sitting on CSR's Board determined that terminating Foster-Bey was in the best interests of CSR and the CSR ESOP because Foster-Bey was no longer performing his duties as President, CEO, member of the Board, and Trustee. Foster-Bey, upon learning that he was being let go, and in retaliation for that decision, immediately attempted to first nullify the Board, claiming that Edgar's and Neil's terms had expired, and then terminate them so that he could continue as an employee of CSR and receive a salary and benefits. Self-interest was the only reason for Foster-Bey's purported termination of Board members. An ESOP Trustee cannot simply fire the outside members of the Board, whose purpose is to oversee the Trustee and ensure he is complying with his duties under ERISA, solely to avoid his own termination as the Trustee and as the President and CEO of an ESOP owned company. Such action is clearly not in the interest of the plan participants and beneficiaries, is a breach of Foster-Bey's fiduciary duties, and is grounds on its own to remove Foster-Bey as Trustee.

I. Plaintiffs are Likely to Succeed on the Merits.

Plaintiffs must show they are likely to succeed at trial, but "need not show a certainty of success." *Pashby*, 709 F.3d at 321 (4th Cir. 2013). As relevant here, Plaintiffs' lawsuit alleges that Foster-Bey violated his fiduciary duties to the CSR ESOP by purporting to terminate members of the Board, and seeks declaratory judgment that Foster-Bey's purported termination of members of the Board was legally ineffective and that the Board's termination of Foster-Bey was legally effective. As described below, Plaintiffs are likely to succeed on their claims.

It is undisputed that Edgar, Neil, and Marsden were validly elected as outside directors of CSR and that Foster-Bey was the only other member of the Board at all times relevant to the Complaint. It is undisputed that under CSR's Bylaws, CSR's Board has sole authority to decide who will be the Trustee of the CSR ESOP. It is undisputed that the Board initially informed Foster-Bey that he was being terminated on September 12, 2016, and informed Foster-Bey that he was terminated as President, CEO, member of the Board, and Trustee on September 26, 2016. It is undisputed that Foster-Bey, after being told that he was being terminated, purported to, as Trustee of the CSR ESOP, vote the shares of CSR held by the CSR ESOP to replace Edgar and Neil as outside members of the Board.

Accordingly, Plaintiffs will succeed on their claims if they can establish either that: (a) Foster-Bey did not have authority to terminate the Board at the time he purported to do so; or (b) such termination constituted a breach of Foster-Bey's fiduciary duties and is, therefore, subject to reversal by the Court. Plaintiffs only need to establish one, but can establish both.

a. Foster-Bey Did Not Have Authority to Terminate Members of the Board.

Foster-Bey did not have authority to terminate members of the Board. Under CSR's Bylaws, only a majority of the Board has authority to remove a director. Bylaws § 4.11. Foster-Bey is not a majority of CSR's directors and did not have the authority necessary to terminate any other members of the Board. Accordingly, Foster-Bey's purported termination of outside members of the Board cannot have been effective.

b. Voting to Terminate the Outside Board Breached Foster-Bey's Fiduciary Duties.

ERISA requires that the Trustee "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104 (ERISA § 404). The purported termination by Foster-Bey of outside Board members in reaction to the Board informing Foster-Bey that it was terminating him was clearly a self-interested act with no other purpose than to perpetuate himself as Trustee, President, and CEO so that he could continue his employment and continue receiving a salary and benefits from CSR. Before he was made aware that the Board had determined to remove him, Foster-Bey had voted to keep the current Board, expressed the intent to extend the members' terms, and was engaged in discussions about how the outside Board members would ultimately be replaced with new outside Board members after those extended terms expired in 2018 and 2019.

Without a doubt, Foster-Bey's attempts to terminate outside members of the Board for his own personal interests is a clear and unequivocal breach of fiduciary duty under ERISA. *See* 29 U.S.C. § 1109 (ERISA § 409); 29 § 1106 (ERISA § 406) (prohibiting plan fiduciaries from "deal[ing] with the assets of the plan in his own interest"); *O'Neill v. Davis*, 721 F. Supp. 1013, 1015 (N.D. Ill. 1989) (finding that "voting of the shares to further the personal interests of the trustees" is a breach of fiduciary duty). The CSR ESOP, and its participants and beneficiaries, depend upon the Board being able to select, oversee, and replace the Trustee when necessary. The Trustee cannot simply fire the Board any time the Board attempts to remove the Trustee, as then an unscrupulous Trustee could never be removed.

Finally, ERISA specifically authorizes the removal of a Trustee that breaches its fiduciary duty: "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." 29 U.S.C. § 1109 (ERISA § 509).

In short, there is no question that Plaintiffs are likely to succeed on the merits of their claims that Foster-Bey breached his fiduciary duties and did not have authority to terminate members of the Board.

II. Plaintiffs are Likely to Suffer Irreparable Harm in the Absence of Preliminary Relief.

A party's "loss of clients' goodwill and future business" constitutes irreparable harm because it "[is] difficult, if not impossible, to measure fully." *Fid. Global Brokerage Group, Inc. v. Gray*, 2010 U.S. Dist. LEXIS 119121 (E.D. Va. Nov. 9, 2010) (quoting *IDS v. SunAmerica*, 958 F. Supp. 1258, 1281 (N.D. Ill. 1997)). Likewise, a controlling shareholder's loss of its right to control its business is itself irreparable harm. *Herb Reed Enters., LLC v. Fla. Entm't Mgmt.*, 736 F.3d 1239, 1250 (9th Cir. Nev. 2013) ("loss of control over business reputation and damage to goodwill could constitute irreparable harm"); *cf. Hughes Systique Corp. v. HSC.Com*, 2013 U.S. Dist. LEXIS 49085 (E.D. Va. Feb. 25, 2013) (business' loss of control over its website was irreparable harm).

Here, allowing Foster-Bey to remain as Trustee of the CSR ESOP and President and CEO of CSR on its face causes irreparable harm to Plaintiffs by depriving them of the right to control CSR and the CSR ESOP. Further, as noted above, the reason for Foster-Bey's termination is his failure to perform his duties, come to work, and perform business development. Loss of future business is all but certain if he is allowed to continue in these roles, and will irreparably harm CSR and the CSR ESOP because it is difficult, if not impossible, to quantify with sufficient specificity for Plaintiffs to win an award of money damages from Foster-Bey at the conclusion of this litigation.

Further, with the current uncertainty, the loss of talented employees with unique expertise and client relationships is all but a given. The harm to CSR from a loss of this talent pool will also be irreparable.

III. **The Balance of Equities Favors Plaintiffs.**

The outside members of the Board terminated Foster-Bey because he was not performing his duties as CEO and President of CSR or as Trustee of the CSR ESOP. If certain of the outside Board members are terminated by Foster-Bey, he can elect whomever he chooses to the Board and perpetuate his control over CSR and the CSR ESOP. The equities clearly favor allowing the disinterested, outside directors to remain in place to protect the interests of the CSR ESOP participants and beneficiaries until this dispute is resolved.

IV. **Injunction is in the Public Interest.**

An ESOP Trustee cannot simply perpetuate itself indefinitely by purporting to terminate the outside Board members who are supposed to oversee the actions and performance of the Trustee. The public interest favors granting the injunction because it allows the disinterested, outside directors to retain oversight and control over CSR while the Court resolves this matter and ensures that the interests of the truly interested parties, CSR's employees and the CSR ESOP participants and beneficiaries, are properly protected.

CONCLUSION

For all of the above-stated reasons, Plaintiffs respectfully request that the Court enter a preliminary injunction freezing the management of CSR and the CSR ESOP as it was on September 26, 2016 until this matter is resolved. On that date, the membership of the Board was Thomas Edgar, Robert Neil, and Cynthia Marsden, Foster-Bey had been removed as President and CEO of CSR and Trustee of the CSR ESOP, and Robert Neil had been selected as Trustee of the CSR ESOP.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day, September 28, 2016, a copy of the foregoing was sent via first class mail and email to the following:

John Foster-Bey, individually and in his
capacity as the former Trustee of the CSR
Incorporated Employee Stock Ownership Plan
5311 Tractor Lane
Fairfax, Virginia 22030
Defendant

Jennifer A. Brust, Esq.